Bringing in the Sheaves: Home Grown Wheat, Weed, and Limits on the Commerce Clause

M. Reed Hopper
Pacific Legal Foundation

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ABSTRACT

United States Supreme Court precedent does not allow us to define the full scope of federal regulation under the Commerce Clause. It does, however, allow us to define the outer limits. By authorizing federal regulation of homegrown wheat, *Wickard v. Filburn* has long been seen as the furthest reach of the commerce power. It still is.

The Supreme Court's authorization of a federal statute regulating home grown marijuana in *Gonzales v. Raich* is a quintessential application of *Wickard*, though it is not an extension of that case. *Wickard* and *Raich* allow federal regulation of intrastate *economic* activity when necessary to support a federal market scheme involving fungible commodities. Whether and to what extent the Supreme Court will allow federal regulation of intrastate noneconomic activity remain open questions. Cases involving noncommercial regulation should continue to be analyzed under the multi-part *Lopez/Morrison* test to determine if the regulation "substantially affects" interstate commerce.[1]

The Supreme Court's decision in *National Federation of Independent Business (NFIB) v. Sebelius* requires, as a constitutional minimum, that federal enactments regulate *existing* economic activity, even under the Necessary and Proper Clause. Congress may not use its commerce power to compel individuals to purchase a particular product or force them into a regulated market. With the current composition of the Supreme Court, the commerce power will not be stretched to cover activities that, if regulated,

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* M. Reed Hopper is a Principal Attorney with the nonprofit Pacific Legal Foundation.

[1] *See generally* United States v. Lopez, 545 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

would authorize a virtual federal police power like that enjoyed by the States.

I. INTRODUCTION

The United States Supreme Court has recognized three categories of activities that Congress is empowered to regulate under the Commerce Clause.[2] First, Congress has unquestionable authority to regulate the use of the channels of interstate commerce.[3] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce."[4] Finally, Congress is authorized to regulate those activities "that substantially affect interstate commerce."[5] The first two categories are self-evident because they are inherent in interstate commerce. [6] The third category, however, is not part of interstate commerce. Thus, the power to regulate such activities is anything but self-evident.[7] Nevertheless, the "substantial effects" category is the most far reaching and may define the outer limits of the commerce power. As evidenced by the Supreme Court's decision regarding marijuana in *Gonzales v. Raich*[8] and, subsequently, the Affordable Care Act in *NFIB v. Sebelius*,[9] those limits depend on *Wickard v. Filburn*,[10]a case of homegrown wheat.

II. "SUBSTANTIAL EFFECTS" AND THE ELASTIC POWER OF CONGRESS

The U.S. Supreme Court has relied on "substantial effects" to uphold a variety of laws under the Commerce Clause (or more accurately, under the Necessary and Proper Clause), but three cases are noteworthy for their expansive application of the commerce power;: *National Labor Relations*

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[2] *See Lopez*, 514 U.S. at 558-59.
[3] *Id.* at 558.
[4] *Id.*
[5] *Id.* at 558-59.
[6] Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).
[7] *Id.*
[8] *Id.* at 52.
[9] Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 132 S. Ct. 2566 (2012).
[10] Wickard v. Filburn, 317 U.S. 111 (1942).

Board (NLRB) v. Jones & Laughlin Steel Corp.,[11] *United States v. Darby*,[12] and *Wickard v. Filburn*.[13] The entirety of these cases set new standards for Congress's authority to regulate under the Commerce Clause.

A. National Labor Relations Board v. Jones and Laughlin Steel Corp.

In *NLRB v. Jones and Laughlin Steel Corp.*, Jones & Laughlin Steel Corporation was charged with unfair labor practices under the National Labor Relations Act when the corporation apparently discharged certain employees because of their union affiliation.[14] As a defense, Jones & Laughlin Steel argued that the Act was constitutionally infirm because it was not directed at commerce, but was a gambit aimed at subjecting all industrial labor relations to federal control without regard to the effects on interstate commerce.[15] To determine the object of the Act, the Court looked to the statutory language itself and observed that the Act empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[16] The Act, in turn, defined "commerce" in the traditional sense to mean "trade, traffic, commerce, transportation, or communication among the several states."[17] The Act went further, defining the term "affecting commerce" as, "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[18] Because the Act explicitly limited the Board's jurisdiction to only those labor practices actually "affecting commerce," the Court found the Act to be a valid Commerce Clause enactment.[19] By "its terms," the Court noted, the Act does "not impose collective bargaining upon all industry regardless of effects

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[11] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[12] United States v. Darby, 312 U.S. 100 (1941).
[13] *Wickard*, 317 U.S. 111.
[14] *Jones & Laughlin*, 301 U.S. at 22.
[15] *Jones & Laughlin*, 301 U.S. at 29.
[16] *Id.* at 30.
[17] *Id.* at 31.
[18] *Id.*
[19] *Id.*at 31.

upon interstate or foreign commerce."[20] Rather, the Court found, "[i]t purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."[21]

The significance of this analysis, as would later become clear in *United States v. Lopez*[22] and *United States v. Morrison*,[23] lies in the Court's search for a jurisdictional element tying the regulated activity to impacts affecting commerce (so as to limit the scope of the Act to the delegated authority), and the Court's reliance on the terms of the Act itself—what the act expressly purports to regulate.

After upholding the Act facially, the Court considered whether the regulated activity was within constitutional bounds as applied in that particular case. Specifically, whether the unjustified firing of employees would affect (i.e. burden or obstruct) interstate commerce.[24] The record showed that Jones & Laughlin Steel was the fourth largest steel producer in the country. Jones & Laughlin Steel was composed of nineteen subsidiaries and integrated operations throughout the nation, which produced, transported, and sold products in interstate commerce.[25] In counterpoint, however, the discharged employees worked only in the local manufacturing plant and were not involved in the transportation or sale of products in interstate commerce.[26] According to the Court, this fact was not determinative.[27] Rather, the case turned on how the stoppage of Jones & Laughlin Steel's manufacturing operations by industrial strife, which the National Labor Relations Act was designed to prevent, would affect interstate commerce.[28]

In considering the matter, the Court relied on what it called the fundamental principle "that the power to regulate commerce is the power to

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[20] Id.
[21] *Id.* at 29.
[22] *See* United States v. Lopez, 514 U.S. 549 (1995).
[23] *See* United States v. Morrison, 529 U.S. 598 (2000).
[24] *Jones & Laughlin*, 301 U.S. at 32.
[25] *Id.* at 25-26.
[26] *Id.* at 40-41.
[27] *Id.* at 41.
[28] *Id.*

enact 'all appropriate legislation' for 'its protection and advancement.'"[29] The Court said that power is plenary, and may be used to protect interstate commerce "no matter what the source of the dangers which threaten it."[30]

Thus, the Court ruled that, "although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[31] This statement describes the third category of activity: activity that substantially affects interstate commerce, which Congress is authorized to regulate under the Commerce Clause. As with similar statements of the "substantial effects" category of Commerce Clause regulation, the Court focused on finding a "close and substantial" impact on interstate commerce and determined whether the regulation was necessary and proper[32] "to protect that commerce."[33]

In view of Jones & Laughlin Steel's far-flung activities, the Court found the stoppage of its intrastate manufacturing operations by industrial strife would have a serious effect on interstate commerce that is direct, immediate, and catastrophic.[34] When an industry on a national scale makes its relation to interstate commerce a "dominant factor," the Court concluded that Congress may regulate labor relations "to protect interstate commerce from the paralyzing consequences of industrial war."[35]

B. United States v. Darby

In *United States v. Darby*, the Supreme Court upheld the Fair Labor Standards Act, which prohibited the shipment of goods in interstate

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[29] *Id.* at 36-37 (internal citation omitted).

[30] *Jones & Laughlin*, 301 U.S. at 37 (citing Mondou v. New York, N.H. & H.R. Co. (Second Employers' Liability Cases), 223 U.S. 1, 51 (1912)).

[31] *Id.*

[32] U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

[33] *Jones & Laughlin*, 301 U.S. at 37.

[34] *Id.* at 41.

[35] *Id.*

commerce produced without compliance with the Act's standards for employee wages and hours.[36] The Court determined interstate commerce is impaired when it is used as an instrument of unfair competition "in the distribution of goods produced under substandard labor conditions."[37] This case extended the reach of the Commerce Clause to local manufacturing operations, which had previously been considered beyond the scope of Congressional authority.[38] The Court explained the scope of that authority in these terms:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.[39]

Once again, the Court's inquiry was directed at both the significance of the regulated activities' effects on interstate commerce and the legitimacy of the end, or purpose, of the regulation (i.e., whether Congress was actually exercising control over interstate commerce.)

C. Wickard v. Filburn

In a further extension of the "substantial effects" category of Commerce Clause enactments, the Supreme Court in *Wickard v. Filburn*[40]upheld the regulation of homegrown wheat under the Agricultural Adjustment Act of 1938. Among other things, that Act involved a national regulatory scheme to control wheat prices by regulating the volume of

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[36] *Darby*, 312 U.S. at 109.
[37] *Id.* at 115.
[38] *Id.* at 115-17.
[39] *Id.* at 118.
[40] Wickard v. Filburn, 317 U.S. 111 (1942).

wheat in the market. "Acreage limitations were the Act's primary tool for controlling the supply of federally subsidized crops."[41] Before the 1941 planting season, it was clear that the low price of wheat was the result of excessive supply.[42] Thus, "[o]nly stiffer penalties on excess production could prevent already overflowing stocks from surpassing the all-time high, which had been reached in 1940."[43]

Under the Act, the Secretary of Agriculture was directed "to proclaim a national acreage allotment for each year's wheat crop....."[44] Because of a growing fear of a glut in the market and an associated price crash, allotments were set and penalties raised for excess crops during the 1941 growing season.[45] Roscoe Filburn was subject to this regulation.

Filburn was a lifelong farmer who raised dairy cattle and poultry.[46] He also grew wheat , which he sold, fed to his cattle and poultry, and used for household consumption.[47] Additionally, Filburn ran a commercial business selling milk and eggs from the cattle and poultry he fed with the wheat to about seventy-five customers a day.[48] Filburn's allotment was 11.1 acres, but he planted twenty-three acres. The extra acreage yielded 239 bushels of wheat in excess of Filburn's allotment. Filburn was subjected to a fine for the excess, which he subsequently challenged in federal court.

On review, the Supreme Court held that homegrown wheat is a fungible commodity that competes with wheat in interstate commerce either by entering the market or, if consumed by the grower, reducing the purchase of wheat in the market.[49] While the grower's "own contribution to the demand for wheat may be trivial by itself," the Court held that the aggregate economic effect of "others similarly situated, is far from trivial" and can be regulated.[50]

By amassing trivial effects of similar activity to find a "substantial

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[41] Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1734 (2003).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1735.
[45] *Id.*
[46] *Id.* at 1734.
[47] Chen, *supra* note 42, at 1734.
[48] *Id.*
[49] Wickard v. Filburn, 317 U.S. 111, 128 (1942).
[50] *Id.* at 127-28.

effect" on interstate commerce, *Wickard* pushed the very limits of Congress's Commerce Clause authority.[51] Never had the Court so liberally construed or so broadly applied the commerce power. Together, *Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in a new era of expanding federal regulation of intrastate activity that seemingly recognized no limit on congressional authority under the Commerce Clause. Indeed, lower courts have relied on these cases to justify federal regulation of noneconomic intrastate activity, such as endangered species protection, without regard to the inherent limitations of the commerce power.[52] In *Lopez* and *Morrison*, however, the Court declared it had gone far enough in broadening the scope of the Commerce Clause. The Court seemingly drew a constitutional line at *Wickard*, which Congress may not pass.

III. CHARTING A NEW COURSE FOR GETTING BACK ON TRACK

Contrary to the prevailing view in the lower courts that Supreme Court jurisprudence required the proverbial "rubber stamp" on Congress's Commerce Clause enactments, the Supreme Court in *Lopez* and *Morrison* found that its Commerce Clause cases, including *Jones & Laughlin Steel*, *Darby*, and *Wickard*, established definite limits to the commerce power. From these limits, the Supreme Court built a new framework for analyzing "substantial effects" and determining the constitutionality of federal legislation purportedly enacted under the Commerce Clause.

A. United States v. Lopez

Alfonso Lopez, Jr. was indicted for violating the Gun-Free School Zones Act of 1990.[53] That Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has

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[51] *Id.*

[52] *See generally* Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1272-73 (11th Cir. 2007); GDF Realty Invs., Ltd. v. Norton (GDF), 326 F.3d 622, 639 (5th Cir. 2003); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); and Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

[53] United States v. Lopez, 545 U.S. 549, 551 (1995).

reasonable cause to believe, is a school zone."[54] The Act defined the term "school zone" as "in, or on the grounds of, a public, parochial or private school" or within a distance of 1,000 feet of such a school.[55]

On March 10, 1992, Lopez, a twelfth grade student, arrived at school with a concealed 0.38 caliber handgun and five bullets.[56] He was arrested and initially charged with firearm possession under state law, but state charges were dropped when federal officers charged Lopez with a federal crime under § 922(q) of the Act.[57] Lopez sought to dismiss the indictment as beyond the commerce power of Congress.[58] The District Court upheld the Act, holding that § 922(q) "is a constitutional exercise of Congress's well-defined power to regulate activities in and affecting commerce."[59] On appeal, however, the Fifth Circuit reversed and held that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause."[60] The Supreme Court affirmed.[61]

Writing for the majority, Chief Justice Rehnquist started with first principles, stating that the "Constitution creates a Federal Government of enumerated powers."[62] This principle, he suggested, was "adopted by the Framers to ensure protection of our fundamental liberties" by maintaining the balance of power between the states and the federal government so as to reduce the risk of abuse from either side.[63] As for the enumerated power delegated to Congress, "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"[64] Justice Rehnquist emphasized the inherent limitations found in the very language of the clause.[65]

Chief Justice Rehnquist cited, for example, the observation of Chief

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[54] Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1990).
[55] Gun-Free School Zones Act, 18 U.S.C. § 921(a)(25) (1990).
[56] *Lopez*, 514 U.S. at 551.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 551-52.
[60] *Id.* at 552.
[61] *Id.*
[62] *Lopez*, 514 U.S. at 551.
[63] *Id.*
[64] U.S. CONST. art. I, § 8, cl. 3.
[65] *Lopez*, 514 U.S. at 556-57.

Justice Marshall in *Gibbons v. Ogden,*[66] when the Court first defined the commerce power:

> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State."[67]

Another inherent limitation to the commerce power, recognized by the *Gibbons* Court and the majority in *Lopez*, was that the commerce power is the power to regulate or to "prescribe the rule by which commerce [itself] is governed.[68]

Chief Justice Rehnquist credited *Jones & Laughlin Steel*, *Darby*, and *Wickard* for creating an era of constitutional jurisprudence that greatly increased the commerce power of Congress beyond the limits previously defined by the Court.[69] But, Chief Justice Rehnquist noted, even those expansive precedents affirmed that the commerce power is "subject to outer limits."[70] Defining these limits, Chief Justice Rehnquist cited the Court's warning in *Jones & Laughlin Steel* that the commerce power is constrained by our "dual system" of federal and state governments, and may not be stretched to encompass "indirect and remote" effects on interstate commerce so as to extinguish "the distinction between what is national and what is local and create a completely centralized government."[71] He also took pains to characterize *Wickard* as the Court's "most far reaching example of Commerce Clause authority over intrastate activity,"[72] noting that at least that case involved some economic activity, and that the

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[66] Gibbons v. Ogden, 22 U.S. 1, 194--95 (1824).
[67] *Lopez*, 514 U.S. at 553 (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).
[68] *Id.*
[69] *Id.* at 556.
[70] *Id.* at 557.
[71] *Id.* (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).
[72] *Id.* at 560.

Agricultural Adjustment Act upheld by the Court was a market scheme directed at regulating competition in commerce directly affected by home-grown wheat.[73] The Chief Justice concluded that the Court had always heeded the warning expressed in *Jones & Laughlin Steel* to observe the constitutional structure, even in those cases where the congressional enactment was upheld based on "substantial effects," and the Court's inquiry in such cases was "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."[74]

After laying this foundation of a limited commerce power, the Court had no difficulty concluding that the Gun-Free School Zones Act had exceeded Congress's Commerce Clause authority and was constitutionally invalid. The framework the Court followed in reaching this conclusion is significant.

The Court readily determined that *Lopez* was a "substantial effects" case. For that determination, the Court looked to the object of § 922(q) and observed that it did not purport to regulate the use of channels of interstate commerce nor prohibit the interstate transportation of a commodity through channels of commerce.[75] Likewise, because the statutory provision prohibited mere possession of a gun in a school zone,[76] it could not be justified as a regulation to protect an instrumentality of interstate commerce or a thing in interstate commerce.[77] If § 922(q) were to be upheld, it would have to be under the third category of Commerce Clause enactments, "as a regulation of an activity that substantially affects interstate commerce."[78]

First, the Court examined the text of the statute and found that, unlike the statute in *Wickard*, § 922(q) by its own terms had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define the terms."[79] This obvious conclusion was compelled by the express

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[73] *Lopez*, 514 U.S. at 556-57.
[74] *Id.*
[75] *Id.* at 559.
[76] *Id.* at 561.
[77] *Id.*
[78] *Id.* at 559.
[79] *Lopez*, 514 U.S. at 561.

language of the Act, which made the mere possession of a firearm in a school zone a crime. The Court also found that the prohibited act, the possession of a gun, was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[80] In fact, the Act was a criminal statute that did not involve a commercial or economic regulatory scheme at all.[81] Section 922(q) could not be sustained, therefore, under Court precedent like *Wickard*, which allowed congressional regulation of activities "that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[82] Interestingly, the Court came to this conclusion even though the prohibited activity, possession of a gun, involved an indisputably commercial item.

After rejecting the aggregation approach to sustaining the regulation of an intrastate activity that is not economic in nature, the Court sought to determine whether § 922(q) contained a "jurisdictional element" that would ensure on a case-by-case basis that the possession of a firearm substantially affects interstate commerce.[83] For this determination, the Court turned again to the language of the Act and found that it did not provide an express requirement that would "limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[84] Because no substantial effect was "visible to the naked eye" in the text of the Act itself, the Court looked at legislative history to identify any express congressional findings that demonstrated Congress's belief that possession of a gun in a school zone substantially affected interstate commerce.[85] The Court was unable to identify any such findings.

Nevertheless, the government argued that Congress could have rationally concluded that § 922(q) did substantially affect interstate commerce because possession of a gun in a school zone could result in

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Lopez*, 514 U.S. at 562-63.

violent crime and violent crime interferes with the national economy in two respects: (1) violent crime increases the cost of insurance throughout the nation; and, (2) violent crime deters people from traveling to unsafe areas.[86] The government also argued that guns in schools undermine the learning environment, generating less productive citizens, which hurts the national economy. To underscore its limitations on the commerce power, the Court addressed the implications of these arguments.[87]

The government acknowledged that under the "costs of crime" argument, Congress could regulate any activity that might lead to violent crime no matter how remote the connection to interstate commerce.[88] Likewise, the Court found that under the government's "national productivity" argument, Congress could regulate anything related to individual economic productivity.[89] The Court concluded that if these arguments were accepted, it would be "hard pressed" to find any individual activity Congress could not regulate under its commerce power.[90] "Depending on the level of generality," the Court observed, "any activity can be looked upon as commercial."[91] This was the fallacy in the government's arguments; it provided no logical stopping point to congressional authority and converted the commerce power into a general police power similar to that enjoyed by the states.[92] This is significant because although some of the Court's cases leaned in that direction and suggested a possible expansion of the commerce power, the Court invalidated § 922(q) as an unauthorized Commerce Clause enactment and declined in *Lopez* to go any further.[93] "To do so," the Court stated, "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated ...and that there never will be a distinction between what is truly national and what is truly local."[94]

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[86] *Id.* at 563-64.
[87] *Id.* at 564.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Lopez*, 514 U.S. at 565.
[92] *Id.* at 567.
[93] *Id.*
[94] *Id.* at 567-68 (citing Gibbons v. Ogden, 22 U.S. 1, 195 (1824)); NLRB v. Jones & Laughlin

B. United States v. Morrison

Morrison is instructive because of what it says about the Court's decision in *Lopez*.[95] In the fall of 1994, Christy Brzonkala enrolled at Virginia Polytechnic Institute.[96] Shortly after meeting fellow students Antonio Morrison and James Crawford, Brzonkala alleged they assaulted and repeatedly raped her.[97] Brzonkala filed a complaint against the students under the school's Sexual Assault Policy.[98] After a hearing, the school's Judicial Committee found Morrison guilty of sexual assault and suspended him for two semesters.[99] Crawford was not punished due to lack of evidence.[100] Morrison's punishment was set aside, however, on administrative appeal.[101] Brzonkala then filed a suit in federal court against Morrison and Crawford under § 13981 of the Violence Against Women Act of 1994. The Act provided a federal civil remedy for victims of gender-motivated violence and stated that, "persons within the United States shall have the right to be free from crimes of violence motivated by gender."[102] The Act defined a "crime of violence motivated by gender" as a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[103] The district court dismissed the suit because it determined that § 13981 was an invalid Commerce Clause enactment. The en banc Fourth Circuit Court of Appeals and the U.S. Supreme Court both affirmed.

Writing again for the majority, Chief Justice Rehnquist returned to first principles, reaffirming that all laws passed by Congress must find authority in the Constitution and that the powers of Congress are

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Steel Corp., 301 U.S. 1, 30 (1937)).

[95] *See generally Lopez*, 514 U.S. at 549.

[96] United States v. Morrison, 529 U.S. 598, 602 (2000).

[97] *Id.*

[98] *Id.* at 603.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] 42 U.S.C. § 13981(b), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

[103] *Id.* § 13981(d)(1).

limited.[104] As *Lopez* emphasized, Chief Justice Rehnquist stated, "Even under our modern, expansive interpretation of the Commerce Clause, Congress's regulatory authority is not without effective bounds."[105] Since § 13981 focused "on gender-motivated violence wherever it occurs" and was not directed at the instrumentalities of interstate commerce or interstate markets, or even things or persons in interstate commerce, the majority determined that the Act would have to fall within the third category of Commerce Clause regulation as a regulation of activity that substantially affects interstate commerce.[106] To conduct its constitutional analysis, therefore, the Court concluded that *Lopez* provided the appropriate framework.[107]

According to the Court, four factors contributed to its decision in *Lopez*.[108] The first factor was that the statute, by its terms, had nothing to do with commerce or an economic enterprise; that is, the Act did not purport to regulate economic activity.[109] The second factor was that the Act contained "no express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce."[110] This factor was important to establish that the Act was in "pursuance of Congress's regulation of interstate commerce."[111] The third factor was that neither the statute "nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce" of the regulated activity.[112] Finally, the fourth factor stated that the connection between the regulated activity and a substantial effect on interstate commerce was remote.[113]

With this framework underlying the Court's Commerce Clause analysis, resolution of the case was clear.[114] First, the Court succinctly held

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[104] *Morrison*, 529 U.S. at 607.
[105] *Id.* at 608.
[106] *Id.* at 609.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 610.
[110] *Morrison*, 529 U.S. at 611-12.
[111] *Id.* at 612.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 613.

that the statute, by its terms, had nothing to do with commerce: "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[115] As a result, gender-motivated crimes were not the type of activity that, through repetition elsewhere, would substantially affect interstate commerce.[116] Thus, not even *Wickard*'s aggregation principle was availing.[117] This was critical to the outcome of the case. As the majority observed, the noneconomic and criminal nature of the prohibited activity in *Lopez* was central to its decision in that case.[118] But the Court did not stop there. To further illustrate the importance of this factor, the Court stated, as matter of historical fact, that it had upheld federal regulation of intrastate activity based on its "substantial effects" on interstate commerce *only* when the regulated activity was economic in nature.[119] This includes *Wickard.*

Next, the Court held that the Violence Against Women Act did not contain an express "jurisdictional element" establishing that Congress was attempting to regulate interstate commerce.[120] Rather than limit its reach to a discrete set of gender-motivated violent crimes that had a perspicuous connection with or effect on interstate commerce, § 13981 was drawn too broadly and included purely intrastate violent crime.[121] The language of the Act did not support the conclusion that § 13981 was adequately tied to interstate commerce.[122]

Unlike the situation in *Lopez*, however, the Court did find that the Violence Against Women Act was supported by congressional findings that gender-motivated violence affects interstate commerce.[123] Among others, those effects included deterring victims from traveling interstate or engaging in interstate business.[124] The Court also cited diminishing national productivity, increased medical costs, and a decrease in the supply

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[115] *Id.*
[116] *Morrison*, 529 U.S. at 610-11.
[117] *Id.* at 611 n.4.
[118] *Id.* at 610.
[119] *Id.* at 611 and 613.
[120] *Id.* at 613.
[121] *Id.*
[122] *Morrison*, 529 U.S. at 613.
[123] *Id.* at 614.
[124] *Id.* at 615.

and demand of interstate goods.[125] The Court did not believe, however, that those findings were sufficient to uphold the Act under the Commerce Clause.[126] The Court explained, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not make it so."[127] That determination, the majority held, is for the Court to decide.

Since Congress followed the "but for" causal chain from the original violent act to every remote effect upon interstate commerce, the Court decided that Congress's findings were faulty and relied on a "method of reasoning" that obliterates the distinction between what is national and what is local, which the Court had already rejected in *Lopez*.[128] The Court was unwilling to allow Congress to regulate noneconomic activity, such as gender-motivated acts of violence, based only on that activity's attenuated effects on interstate commerce.[129] Therefore, the Court held that Congress did not have authority under the Commerce Clause to enact § 13981 of the Violence Against Women Act.[130]

IV. WHAT THE SUPREME COURT WAS DOING IN *LOPEZ* AND *MORRISON*

Lopez and *Morrison* are critical to understanding modern Commerce Clause jurisprudence. Beyond the obvious objective of resolving the legal issues raised in those cases, it is equally obvious that the Supreme Court used those cases to school Congress and the lower courts in the distinct limits of the commerce power.[131]

The Supreme Court's repeated reference to "first principles" seems to

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Morrison*, 529 U.S. at 615.

[129] *Id.* at 617.

[130] *Id.* at 619.

[131] Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 132 S. Ct. 2566, 2676-77 (2012) (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) ("It should be the responsibility of the Court to . . . [r]emind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.").

get lost in the academic debate over the reach of the Commerce Clause. In both *Lopez* and *Morrison*, however, the Court's understanding of "first principles" determined the outcome of those cases. As explained in *Lopez* and reiterated in *Morrison*, the Court understood "first principles" to mean that the Constitution established a federal government of enumerated powers which are few and defined, in contrast to the powers of the States which are numerous and indefinite.[132] The Court emphasized that this limitation on federal authority was necessary to ensure fundamental liberties and protect the nation against the unfettered federal power of a "completely centralized government."[133] Consequently, while some cases had broadly construed the power delegated to Congress to regulate commerce, the majority noted in *Lopez* that the Court had never abandoned "first principles" and its cases had set distinct limits on Congress's exercise of the commerce power.[134] To determine those limits, the Court put forward the four-part *Lopez* test for regulation that must be upheld, if at all, as the regulation of activities that substantially affect interstate commerce. In the end, the Court seeks to determine if a challenged statute or provision provides a meaningful limit on federal power. If not, it will not be sustained.

This conclusion is not simply an academic observation;, it is a statement of substantive law. In *Lopez* and *Morrison*, the Supreme Court took pains to trace the development of its Commerce Clause cases from *Gibbons v. Ogden*, in which the Court initially defined the nature of the commerce power,[135] to *Jones & Laughlin Steel*, *Darby*, and *Wickard*.[136] Nearly half of the majority opinion in *Lopez* is devoted to extracting from these cases the fundamental concept that the Commerce Clause has distinct limits.

In its Commerce Clause cases, the Supreme Court has consistently defined those limits in terms of the legitimate ends for which the commerce power can be employed. Starting with *Ogden*, the Court affirmed that the

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[132] *See* United States v. Lopez, 545 U.S. 549, 552 (1995).
[133] *Id.* at 552-55.
[134] *Id.* at 556-57.
[135] *Id.* at 553.
[136] *Id.* at 556.

commerce power was the power to regulate commerce.[137] In other words, the *Ogden* Court recognized that Congress has authority to regulate commerce itself. The Court saw this as an inherent limitation on the commerce power. For example, the Court observed that the constitutional grant of authority to regulate interstate commerce presupposes that Congress cannot regulate that which is not interstate commerce, such as purely intrastate commerce.[138] While the Supreme Court has seemingly leaned away from this restrictive view in later cases, the Court has not lost sight of the principle that the legitimate end of the commerce power is the regulation of interstate commerce itself.

Even when the Court was stretching the bounds of the Commerce Clause to encompass some types of intrastate activity, the touchstone of the Court's "substantial effects" cases was whether the statute governed interstate commerce. In *Jones & Laughlin Steel*, the Supreme Court held that Congress could regulate intrastate activities the control of which is "essential or appropriate to protect [interstate] commerce from burdens and obstructions."[139] Likewise, in *Darby*, the Court held that Congress could regulate intrastate activities for the "attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[140] In *United States v. Wrightwood Dairy Co.*,[141] which was decided the same year as *Wickard*, the Court held that the power of Congress to regulate commerce "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."[142] There is a unifying theme within these decisions: the power to regulate interstate commerce is limited to the power to enact "all appropriate legislation" for "*its* protection and advancement."[143] This fundamental principle greatly simplifies Commerce Clause analysis under the "substantial effects" category. It is the key to understanding *Lopez* and

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[137] *Id.* at 553.

[138] *Lopez*, 514 U.S. at 553.

[139] *Jones & Laughlin*, 301 U.S. at 37.

[140] United States v. Darby, 312 U.S. 100, 118 (1941).

[141] United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942).

[142] *Id.* at 119.

[143] *Jones & Laughlin Steel*, 301 U.S. at 37 (emphasis added) (citing The Daniel Ball., 10 Wall. 557, 564, 19 L.Ed. 999).

Morrison.

The majority opinion in *Lopez* opens with its holding:

> The Act neither regulates a commercial activity nor contains a requirement that the possession [of a gun] be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . . ."[144]

This statement of the Court's ultimate finding in the case is a succinct pronouncement of the constitutional standard for determining if a statute "substantially affects" interstate commerce.

A statute that does not regulate a commercial or economic activity, or does not expressly require that the regulated activity have any connection with interstate commerce, is clearly not enacted to protect or advance interstate commerce. Such a statute cannot be said to be in pursuance of a legitimate Commerce Clause end;—the exercise of Congress's power to govern interstate commerce. This conclusion follows from the Court's understanding of "first principles," which dictate meaningful limits to protect the federal-state balance. Accordingly, the first *Lopez* factor is directed at determining whether Congress chose to regulate an economic or commercial activity directly, whereas the other three factors are directed at determining whether Congress required the regulated activity to have a direct and concrete connection to interstate commerce.

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[144] *Lopez*, 514 U.S. at 551.

V. *GONSALEZ V. RAICH – WICKARD* REVISITED

The "substantial effects" test as refined by *Lopez* and *Morrison* was soon to be tested in a case challenging the constitutionality of the federal Controlled Substances Act (CSA), as applied to the purely private and local manufacture, possession, and use of marijuana for medicinal purposes. In 1996, the State of California passed the Compassionate Use Act, which exempted from state criminal prosecution physicians, patients, and caregivers who possess or cultivate marijuana for medical use on a physician's approval. [145] Angel Raich and Diane Monson were two California residents suffering from a variety of ailments who sought to avail themselves of the Compassionate Use Act's protections.[146] Monson was able to cultivate her own marijuana, which she smoked or atomized using a vaporizer.[147] Raich was unable to cultivate her own marijuana and relied on caregivers who grew and provided the substance without charge.[148]

The State's Compassionate Use Act contravened the Controlled Substances Act. The CSA made it a federal crime to "manufacture, distribute, dispense, or possess any controlled substances," including marijuana, except as the CSA allowed.[149] Monson ran afoul of the CSA in 2000 when, pursuant to the Act, agents from the federal Drug Enforcement Administration entered her home and destroyed her six cannabis plants.[150] Monson and Raich subsequently sought an injunction against the United States from enforcing the CSA "to the extent it prevent[ed] them from possessing, obtaining, or manufacturing cannabis for their personal medical use."[151]

The district court denied the injunction, but the Ninth Circuit reversed. Relying on *Lopez* and *Morrison*, the split panel held that intrastate, noncommercial cultivation, possession, and use of marijuana

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[145] *Raich*, 545 U.S. at 5.
[146] *Id.* at 6-7.
[147] *Id.* at 7.
[148] *Id.*
[149] *Id.* at 13.
[150] *Id.* at 65 (Thomas, J., dissenting).
[151] *Raich*, 545 U.S. at 7.

constituted a class of purely local activities that could not be reached by the commerce power.[152] On writ of certiorari, however, in *Gonzales v. Raich*,[153] the Supreme Court upheld the CSA against the constitutional challenge..

The question presented to the Supreme Court was whether the power granted Congress to "make all laws which shall be necessary and proper for carrying into execution," its authority to "regulate commerce with foreign nations, and among the several states" included "the power to prohibit the local cultivation and use of marijuana."[154]

In answering the question, the majority found the "similarities between [*Raich*] and *Wickard*. . . striking."[155] What struck the court in particular was that the respondents, Raich and Monson, were, like the farmer in *Wickard*, cultivating for home use a "fungible commodity" [156] for which an established, albeit illegal, interstate market existed.[157] The Court explained, "[j]ust as the Agricultural Adjustment Act was designed to control the volume" of wheat in interstate commerce and thereby the market price, "a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets."[158] In *Wickard*, it "had no difficulty concluding" that Congress could rationally believe that, "when viewed in the aggregate," excluding home-consumed wheat from "the regulatory scheme would have a substantial influence on

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[152] *Id.*

[153] *Id.* at 33.

[154] *Id.* at 34 (Scalia, J., concurring) (,explaining the "substantial effects" category of Commerce Clause regulation is "*misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

[155] *Raich*, 545 U.S. at 2.

[156] *Id.* at 40 (Scalia, J., concurring) ("Not only is it impossible to distinguish 'controlled substances manufactured and distributed intrastate' from 'controlled substances manufactured and distributed interstate,' but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.").

[157] *Raich*, 545 U.S. at 18.

[158] *Id.* at 19.

price and market conditions."[159] Likewise, the Court reasoned, "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[160]

In contrast, the dissent argued that *Lopez* and *Morrison* precluded this determination because the regulated activities were neither commercial nor economic in nature. Justice O'Connor opined that *Raich* was "materially indistinguishable" from those two cases. [161] Although the majority acknowledged that Raich was not engaged in commercial activity because she did not sell marijuana,[162] the majority belittled the dissent's view stating that the "statutory challenges at issue in those cases were *markedly different* from the challenge to the CSA."[163] The pivotal distinction the court cited was that in *Raich* respondents challenged individual applications of a "concededly valid statutory scheme," whereas in *Lopez* and *Morrison* the parties argued that an entire statute or provision was beyond the commerce power.[164]

According to the Court, the Gun-Free School Zones Act at issue in *Lopez*, unlike the Controlled Substances Act, was "a brief, single-subject statute" that did not regulate "any economic activity" whatsoever and as such, the regulated activity could not be aggregated to show substantial effects on interstate commerce.[165] *Morrison* was no different.[166] Thus, the Court concluded the CSA was at the "opposite end of the regulatory spectrum."[167] The majority observed that contrary to the statutes in *Lopez* and *Morrison*, the CSA was a broad, detailed statute establishing a "comprehensive framework for regulating the production, distribution, and possession" of "controlled substances" and control of Schedule I drugs like marijuana was an "essential part of a larger regulation of economic activity

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[159] *Id.*
[160] *Id.*
[161] *Id.* at 45.
[162] *Id.* at 50.
[163] *Raich*, 545 U.S. at 23 (emphasis added).
[164] *Id.*
[165] *Id.* at 23-24.
[166] *Id.* at 25.
[167] *Id.* at 24.

in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[168]

Ultimately, the deciding factor for the majority was its conclusion that the CSA was a regulation of "quintessentially economic" activity involving the "production, distribution, and consumption of [fungible] commodities" in the regulated market, like the Agricultural Adjustment Act in *Wickard*.[169] Simply put, the CSA was a market scheme. That determination was enshrined in the court's actual holding:

> Thus, as in *Wickard*, when it enacted comprehensive legislation *to regulate the interstate market in a fungible commodity*, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.[170]

The dissent was alarmed by the holding and suggested that it signaled a course correction away from *Lopez* and *Morrison* back toward the dangerous shoals of a limitless commerce power.[171] Justice Scalia found this concern overblown by limiting *Raich* to its facts:

> Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to little "more than a drafting guide." *Post,* at 2223 (opinion of O'CONNOR, J.). I think that criticism unjustified. Unlike the power to regulate activities that have a

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[168] *Id.* at 36 (citing *Lopez*, 514 U.S. at 561).
[169] *Raich*, 545 U.S. at 25.
[170] *Id.* at 22 (emphasis added).
[171] *Id.* at 51 (O'Connor, J., dissenting).

> substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can *only* be exercised in conjunction with congressional regulation of *an interstate market*, and it extends *only* to those measures necessary to make the interstate regulation effective.[172]

In short, according to Justice Scalia's concurring opinion in *NFIB v. Sebelius*, *Raich* does "not represent the expansion of the federal power to direct into a broad new field."[173] As Chief Justice Roberts would subsequently note in *NFIB*,,[174] *Wickard* is still regarded as the most far-reaching Supreme Court Commerce Clause case.[175] How far the Supreme Court will extend the commerce power to intrastate activities under a non-market scheme remains to be seen.[176]

VI. THE AFFORDABLE CARE ACT AND THE OUTER LIMITS OF THE COMMERCE POWER

Although it is still unclear how far the Supreme Court will go in

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[172] *Raich*, 545 U.S. at 28 (emphasis added).

[173] Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius, 132 S. Ct. 2566, 2646 (2012).

[174] *Id.* at 2578.

[175] *Id.* at 2588.

[176] In *Rapanos v. United States*, 547 U.S. 715, 730 (2006), the petitioner challenged the federal government's regulation of unpermitted discharges to remote wetlands, under Section 404 of the Clean Water Act, as beyond the statutory language, as well as the commerce power. Although a majority of the Court determined that the language of the Clean Water Act did not authorize the regulation of remote, insubstantial water bodies, therefore avoiding the constitutional question, Justice Kennedy's lone concurring opinion suggested that, by including a requirement that a regulated water body have a "significant nexus" to a downstream navigable-in-fact water, no constitutional conflict would arise. *See id.* at 739, 782. Justice Kennedy clearly equated a "significant nexus" to a "navigable-in-fact water" with a substantial effect on interstate commerce. *Id.* at 782-83. The problem with this, however, is that the Clean Water Act itself did not contain an express (or even implied) requirement that the regulated water body (such as a remote wetland) have any sort of connection to interstate commerce. 33 U.S.C.A. § 1362; *Rapanos*, 547 U.S. at 730-31. In effect, therefore, by requiring that the government show a "significant nexus" between a remote water body and a downstream navigable-in-fact water, Justice Kennedy was rewriting the Clean Water Act to include a jurisdictional element that would limit the reach of the Act to a discrete set of activities that have an "explicit connection with or effect on interstate commerce" as required by *Lopez*, 514 U.S. at 561-62, and *Morrison*, 529 U.S. at 613. This would save the Act from constitutional scrutiny and possible invalidation. Justice Kennedy's citation to *Raich* was gratuitous because *Raich* does not require a jurisdictional element. *See Rapanos*, 547 U.S. at 783.

authorizing federal regulation of intrastate activity in the absence of a comprehensive economic statute that controls an entire market in fungible commodities, we now know the outer limits of the commerce power.

Congress passed the Patient Protection and Affordable Care Act in 2010.[177] A key provision of that Act--the individual mandate--required most people to obtain a minimal amount of health insurance through their employer, a government program, or by direct purchase.[178] Failure to do so would subject the individual to an economic "penalty."[179] The mandate was challenged on constitutional grounds by twenty-six states, several individuals, and the National Federation of Independent Business.[180] The mandate was declared invalid by the district court and the Eleventh Circuit for exceeding the commerce power; the Supreme Court affirmed in *NFIB v. Sebelius*, although the mandate was upheld on other grounds.[181]

Chief Justice Roberts wrote the Court's principal opinion,[182] which is reminiscent of Chief Justice Rehnquist's discussion in *Lopez* in that it serves to remind Congress and lower courts (and perhaps also the people) that congressional powers are limited to those enumerated and Congress does not have the plenary power vested in the states to regulate for the general welfare.[183] He stated that this limit is by design and intended to protect individuals from federal overreach.[184] Chief Justice Roberts acknowledged, as he must, that Congress is expressly authorized to regulate commerce among the States, and that "power over activities that affect interstate commerce can be expansive."[185] As an example of how expansive this power can be, Chief Justice Roberts cited the regulation of locally grown wheat in *Wickard*.[186] The Chief Justice explained, "*Wickard* has long been regarded as

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[177] *NFIB*, 132 S.Ct. at 2580.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 2580-81, 2591; *see id.* at 2598, 2600 (upholding the individual mandate under the taxing power).

[182] Although Justices Scalia, Kennedy, Thomas and Alito dissented from the Court's final judgment upholding the individual mandate under the taxing power, they agreed with Justice Roberts that the mandate was invalid under the commerce power. *See id.* at 2644-50.

[183] *Id.* at 2577-78; United States v. Lopez, 545 U.S. 549, 552 (1995).

[184] *NFIB*, 132 S.Ct. at 2578.

[185] *Id.*

[186] *Id.* at 2578-79.

'perhaps the most far reaching example of Commerce Clause authority over intrastate activity'" in the history of the nation.[187] But Roberts also observed that the individual mandate reaches even farther by regulating inactivity.

It is undisputed that the Affordable Care Act is a comprehensive economic regulatory scheme. Like the Agricultural Adjustment Act in *Wickard* or the Controlled Substances Act in *Raich*, the Affordable Care Act regulates an entire market. The government therefore argued that *Wickard* and *Raich* were controlling, and Congress could mandate the individual purchase of health insurance because, in the aggregate, such purchases have a "substantial effect on interstate commerce," or the mandate is "necessary and proper" to effectuate the Act.[188] But Chief Justice Roberts distinguished those cases.

In all of the Court's prior Commerce Clause cases, including *Wickard* and *Raich*, Roberts noted that Congress was regulating "preexisting economic activity."[189] In contrast, the individual mandate "does not regulate existing commercial activity."[190] To the contrary, the mandate "compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[191] In other words, the mandate creates the commerce it seeks to regulate.[192] Chief Justice Roberts observed that relying on this logic would allow the federal government to pull individuals within its regulatory power by compelling them to buy certain products.[193] This is barred under the Constitution.[194] Accordingly, Chief Justice Roberts held *Wickard* and *Raich*

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[187] *Id.* at 2588 (citing *Lopez*, 514 U.S., at 560).

[188] *NFIB*, 132 S.Ct. at 2585.

[189] *NFIB*, 132 S.Ct. at 2590 ("Each one of our cases, including those cited by Justice Ginsburg . . . involved preexisting economic activity. *See, e.g.*, *Wickard*, 317 U.S., at 127–129, 63 S.Ct. 82 (producing wheat); *Raich*, *supra*, at 25, 125 S.Ct. 2195 (growing marijuana).").

[190] *Id.* at 2587.

[191] *Id.*

[192] *Id.* at 2586 ("The Constitution grants Congress the power to 'regulate Commerce.' Art. I, § 8, cl. 3 (emphasis added). The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous.")

[193] *Id.* at 2588, 2591.

[194] *Id.* at 2591 ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing

are unavailing because inactivity cannot be aggregated to show a substantial effect on interstate commerce and the regulation of inactivity is not "necessary and proper" to the regulation of *existing* commerce.[195]

This, then, is the outer limit of the Commerce Clause: as a constitutional minimum, the regulation must apply to "preexisting economic activity."

VII. CONCLUSION

Current Supreme Court precedent is insufficient to define the full scope of the Commerce Clause. It is, however, sufficient to define the contours of that power. Under *NFIB*, Congress may not: (1) regulate inactivity;[196] (2) compel individuals to purchase a commodity or enter a market;[197] and, (3) create by regulation the very market it seeks to regulate.[198] Instead, Congress may only regulate preexisting activity.[199] So far, the Supreme Court has only upheld the regulation of preexisting *economic* activity, including *Wickard* and *Raich*.[200]

There is some debate about whether Chief Justice Roberts' Commerce Clause analysis in *NFIB* is dicta with little or no precedential value.[201] This is a purely academic debate, however, because it is clear that Justices Scalia,

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Congress to 'regulate Commerce.'").

[195] *Id.* at 2587-94.

[196] *NFIB*, 132 S.Ct. at 2590.

[197] *Id.* at 2573 ("The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it.").

[198] *Id.* at 2586 ("If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous.").

[199] *Id.* at 2590.

[200] Some confusion remains as to whether *Wickard* and *Raich* involved economic activity, but it is clear that a majority on the Supreme Court believes it is so. In both *Lopez* and *Morrison*, the Court characterizes the production of wheat for personal use as economic activity. *See Lopez*, 514 U.S. at 560-61; *Morrison*, 529 U.S. at 610. Likewise, in *NFIB*, Justice Roberts cites both the production of wheat and marijuana, for personal use, as an economic activity. *See* note 191. This may seem hard to square with the majority's observation in *Raich* that the production of marijuana was not commerce, but the Court was apparently using the word "commerce" to mean buying and selling goods. *Raich*, 545 U.S. at 17. It used the word "economic" to mean "the production, distribution, and consumption of commodities." *Id.* at 25. Although the production of marijuana for personal use, like the production of wheat for personal use, is not commerce, per se, the production of a fungible commodity that could enter the stream of commerce, can be said to be economic activity.

[201] *See* Timothy Sandefur, *So It's a Tax, Now What?; Some of the Problems Remaining After* NFIB v. Sebelius, TEX. REV. L. & POL. 203, 4 (2013).

Kennedy, Thomas, and Alito share the Chief Justice's interpretation of the commerce power.[202] For now, these limitations on Commerce Clause enactments constitute the Supreme Court's majority view.

This same majority views the production of wheat and marijuana as *economic* activities.[203] The Supreme Court has, therefore, yet to determine how far the Commerce Clause may go in authorizing federal regulation of noneconomic intrastate activity. According to Justice Scalia, *Lopez* suggests "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[204] The Supreme Court did not, however, address such a fact pattern in *Wickard* or *Raich*, and neither *Lopez* nor *Morrison* had anything to do with economic activity.[205] As such, this remains an open question.

Wickard still represents the farthest reach of the Supreme Court's Commerce Clause cases.[206] *Raich* is a quintessential *Wickard* case that did not expand the power of Congress.[207] *Wickard* and *Raich* both involved a consideration of the "substantial affects" test and the Necessary and Proper Clause. Although some argue that these cases authorize the regulation of any activity that undermines a broad federal regulatory scheme,[208] *Wickard* and *Raich* only addressed a broad *economic* scheme directed at an entire market in fungible commodities in those cases, . The Supreme Court has never relied on a *Wickard/Raich* analysis to resolve a case that did not involve a market type statute. Although the Affordable Care Act was clearly such a statute, the Act went too far. Thus, *Wickard* and *Raich* provided no precedent for the Affordable Care Act.[209]

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[202] *NFIB*, 132 S. Ct. at 2642 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting).

[203] *Id.* at 2588.

[204] *Raich*, 545 U.S. at 37.

[205] *Lopez*, 514 U.S. at 561.

[206] *NFIB*, 132 S. Ct. at 2588.

[207] *Id.* at 2646 ("[*Raich*'s] prohibition of growing (cf. *Wickard*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122), and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field.").

[208] *See, e.g.*, Michael C. Blumm & George A. Kimbrell, *Clear the Air:* Gonzalez v. Raich, *the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 494 (2005).

[209] *NFIB*, 132 S. Ct. at 2646 ("*Raich* is no precedent for what Congress has done here.").

The Supreme Court will undoubtedly apply *Wickard* and *Raich* to cases involving statutes addressed directly to interstate economic activity. The Court will undoubtedly give Congress a great deal of leeway to regulate intrastate activities that support those statutes. It is likely, however, that the five justices that rejected the individual mandate in *NFIB* because it exceeded the commerce power would limit *Wickard* and *Raich* to uphold "congressional regulation of an interstate market."[210]

As for statutes or challenged provisions that are not directed at interstate markets, like many of the nation's federal environmental laws, the court should apply the "substantial effects" analysis refined in *Lopez* and *Morrison* and consider: (1) whether the Act contains an "express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce;" (2) whether the statute or "its legislative history contains express congressional findings regarding the effects upon interstate commerce" of the regulated activity; and, (3), whether the connection between the regulated activity and a substantial effect on interstate commerce is remote.[211]

In all of its Commerce Clause cases, the present court can be expected to rely on "first principles" and reject any interpretation of the commerce power that leads to unlimited federal authority. As Justice Scalia noted with some exasperation in *NFIB*, "[t]he Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could not be justified as necessary and proper for the carrying out of a general regulatory scheme. . . . It was unable to name any."[212] Accordingly, Justice Roberts concluded:

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[210] *Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("Unlike the power to regulate activities that have a substantial effect on interstate commerce, *the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market*, and it extends only to those measures necessary to make the interstate regulation effective.") (emphasis added).

[211] *See Lopez*, 514 U.S. at 561-62; *see also Morrison*, 529 U.S. at 610-12.

[212] *NFIB*, 132 S. Ct. at 2647.

> The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. And [*Lopez* and *Morrison*] show that the scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.[213]

[213] *Id.* at 2646.